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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 483

CLIFFORD F. MacEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,
Petitioners,

—against—

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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EDWARD F. CLARK,
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THE COURT PRESS, N. Y. C.

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—against—

UNITED STATES OF AMERICA for the use and benefit of THE CALVIN TOMKINS COMPANY,

Respondent.

Petition for Writ of Certiorari.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

JURISDICTIONAL STATEMENT.

The jurisdiction of this Honorable Court is invoked under Section 240(a) and subsection 8(a) of the Judicial Code, as amended, 28 U. S. C., Sections 347 and 350, and Supreme Court Rule XXXVIII, par. 5(b).

SUMMARY STATEMENT.

Petitioners, Clifford F. MacEvoy Company (hereinafter called MacEvoy Co.) and The Aetna Casualty and Surety Company, by their counsel, pray that a writ of certiorari issue to review a decision (R. 22) of the United States Circuit Court of Appeals for the Third Circuit, rendered August 13th, 1943, in an action entitled *United States of*

America for the Use and Benefit of the Calvin Tomkins Company, Plaintiff, against *Clifford F. MacEvoy Company and The Aetna Casualty and Surety Company*, Defendants, Docket #8351, reversing an order and decree (R. 15) of the District Court of the United States for the District of New Jersey in favor of petitioners, which dismissed the complaint of plaintiff, the Calvin Tomkins Company (hereinafter called Calvin Tomkins), on motion of the petitioners, on the ground that the same failed to state a claim against defendants on which relief could be granted.

This is an action by the "use-plaintiff", Calvin Tomkins Co., upon a payment bond (R. 16) furnished by MacEvoy Co., as principal, and Aetna Casualty and Surety Company as surety, under the Miller Act, 49 Stat. at L. 793, 794; 40 U. S. Code, Sec. 270 a-d (printed as Appendix A to Petitioners' Brief, pp. 27-30), in connection with a contract, dated June 3, 1941, between the United States of America, acting through the Federal Works Administration, and MacEvoy Co. for the construction of a defense housing project near Linden, New Jersey. Such contract, as is indicated by the complaint (R. 4), was on a "cost plus fixed fee" basis.

The substance of the complaint (R. 3-6) is that MacEvoy Co. purchased from one James H. Miller & Company certain building materials for such project, that such materials were obtained by Miller & Company from plaintiff and that Miller & Company has failed to pay plaintiff a balance of $12,033.49. There is no allegation that Miller & Company agreed to perform or did perform any part of the work on said construction project. Neither is it disputed that MacEvoy Co. paid its materialman, Miller & Company, in full (R. 18-19).

Defendants' motion to dismiss the complaint (R. 7) for failure to state a claim on which relief could be granted,

was granted by District Court Judge Fake with an opinion (R. 8-14). An order and decree of the District Court dismissing the complaint was entered April 5, 1943, which order and decree was reversed by the Circuit Court of Appeals with an opinion (R. 21-29), and order of reversal filed August 13th, 1943 (R. 30). Defendants' petition for rehearing (R. 31-42) was denied on September 20th, 1943 (R. 43).

Questions Presented.

(1) Whether a third person (the "use plaintiff"), supplying material to a materialman (Miller & Co.) who in turn furnishes the same to the principal contractor (MacEvoy Co.) may recover against the principal contractor and its surety under the payment bond furnished pursuant to the Miller Act where

   (a) No contractual relationship, express or implied, exists between said third person and the principal contractor, and

   (b) No contractual relationship exists between said third person and any subcontractor performing any part of the work under the public contract.

(2) Whether the decision of the Circuit Court of Appeals is not directly contrary to the plain legislative intent as shown both by the language of the Miller Act and the legislative history leading up to its enactment.

(3) Whether the construction placed upon Section 2(a) of the Miller Act (40 U. S. C. Sec. 270b(a)) by the Circuit Court of Appeals does not result in subjecting Government contractors to an indeterminable and unlimited possible liability under the

payment bond as against a definite standard of liability limited to liability to persons having contractual relationship, express or implied, with the principal contractor, or direct contractual relationship with a subcontractor.

(4) Whether the word "subcontractor" as used in the first sentence of said Section 2(a) of the Miller Act includes a mere materialman performing no work or labor.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Reason 1: The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

(a) The question here involved, which may be broadly stated as involving the determination of the classes of persons entitled to sue upon the payment bond under the Miller Act, has not only never previously been passed upon by this court, but has never previously been passed upon by any federal court.

(b) The importance of the question and necessity for final determination by this Court is indicated by the following:

(1) The legislative history, including the predecessor statute, the Heard Act, 28 Stat. at L. 278, 33 Stat. at L. 811, 36 Stat. at L. 1167; 40 U. S. C. Sec. 270 (printed as Appendix B to Petitioners' Brief at pp. 31-33) and the extensive hearings held before the Committee on the Judiciary at the time of enactment of the Miller Act, at which surety company, materialmen, contractors, and Government representatives testified to the urgent need for definite legislation to correct then existing evils or ambiguities.

(2) The fact that the decision of the Circuit Court of Appeals effects an important change in the previously prevailing law as to the relationship, rights and obligations of respective classes of persons in the building construction trades such as contractors, subcontractors, materialmen and vendors and breaks down well-established and important definitions of and distinctions between these classes, leaving this important field of the law in a chaotic state.

(3) The unusual construction of the word "subcontractors" by the Circuit Court of Appeals, which is at variance with the construction adopted by the majority of the State courts in construing similar state statutes as well as state laws affecting mechanics' liens.

Reason II: The decision of the Circuit Court of Appeals, insofar as it purports to follow the decisions under the earlier Heard Act, is in conflict with a reported opinion of a federal court of similar appellate jurisdiction, *i. e.*, the decision of the Court of Appeals of the District of Columbia in the case of *Continental Casualty Co.* v. *North American Cement Corp.*, 91 F. (2d) 307, upon a statute of said District identical with the Heard Act, but decided after the enactment of the Miller Act.

Reason III: The public interest, and particularly the interest of the United States Government, will be promoted by prompt settlement in this Court of the questions involved.

A logical extension of the holding of the Circuit Court of Appeals would permit all persons, no matter how remote their relationship to the contractor or to any subcontractor, to sue upon the payment bond if their work, labor or materials ultimately contributed to the public

project—including the laborer in the mines, the logger in the logging camp and indeterminable classes of persons, against whose claims no amount of prudence could protect the contractor or his surety.

This totally unjustifiable and indeterminable risk placed upon Government contractors by this decision will undoubtedly result in substantially increased costs to the Government in the performance of public contracts. This is particularly true in the "cost plus fixed fee" type of contract which is the form of petitioners' contract with the Government (R. 4). The very nature of the "cost plus fixed fee" contract restricts the contractor in making his own selection of materialmen and subcontractors to those submitting the lowest bids, frequently resulting in rejection of those most financially responsible. Contractors will necessarily refuse to perform Government work at prevailing fees but will insist that such fees cover the possible liability to the most remote claimants as the only means by which the contractor can obtain a semblance of protection. It is equally true that in "lump sum" contracts such extraordinary risks and possible liability will be reflected in the bids submitted to the Government. The increased cost of the bond premium which will be required by surety companies under such holding will, of course, ultimately be borne by the Government and reflected in any "lump sum" bid or in the cost of any "cost plus" contract. The Government interest is also substantially involved from the viewpoint of its possible liability to reimburse "cost plus fixed fee" contractors for loss incurred from such claims made by persons having no contractual relationship with the contractor or any subcontractor, on the equitable ground that the fixed fee did not contemplate such loss to be borne by the contractor who has complied with the statutory requirements, and, therefore, must be borne by the

Government as a part of the cost of the public project. The present era of large scale Government construction, as well as the probable participation by the Government in post-war reconstruction, requires settlement of this question at the present time.

WHEREFORE your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of ... ls of the Third Circuit, commanding said court to ce. ify and send to this Court a full and complete transcript of the record of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 8351, *United States of America for the Use and Benefit of the Calvin Tomkins Company*, Appellant, against *Clifford F. MacEvoy Company and The Aetna Casualty and Surety Company*, Appellees, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated, Newark, New Jersey, November 5, 1943.

ELMER O. GOODWIN,
Counsel for Petitioners.

EDWARD F. CLARK,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1943.

No.

CLIFFORD F. MACEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,

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—against—

UNITED STATES OF AMERICA for the use and benefit of THE CALVIN TOMKINS COMPANY,

Respondent.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the District Court is officially reported at 49 F. Supp. 81, and is printed in this Record (R. 8-14). The opinion of the Circuit Court of Appeals, filed August 13th, 1943, is not yet officially reported but is printed in this Record (R. 22-29).

Basis for Jurisdiction.

The statement showing the grounds upon which jurisdiction of this Court is invoked is set forth at page 1 of the foregoing petition, and is, by reference, adopted as part of this brief.

Statutes Involved.

The statute directly involved is the Miller Act, 49 Stat. at L. 793, 794, Act of August 24, 1935, Chapter 642, Secs. 1, 2, 3, 4 (40 U. S. C. Sec. 270a-d) and is printed as Appendix A hereto (pp. 27 to 30 hereof).

The specific portion of the Miller Act, more particularly involved is the construction of the following language contained in Section 2(a) (40 U. S. C. Sec. 270b(a)):

> "Sec. 2(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made * * *"

The Heard Act (Act of August 13, 1894, Ch. 280, as amended, 28 Stat. at L. 278, 33 Stat. at L. 811, 36 Stat. at L. 1167; 40 U. S. C. Sec. 270) which preceded the Miller

Act and was repealed at the time of enactment of the Miller Act, is indirectly involved as possibly bearing on the construction of the Miller Act. The Heard Act is printed as Appendix B hereto (pp. 31 to 33 inclusive).

Statement.

The material facts have been set forth in the Summary Statement at pages 1 to 3 of the preceding Petition and such statement is, by reference, adopted as part of this brief.

Argument.

POINT I.

The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court.

A. This Court has not previously passed upon the question here involved.

The precise question here involved, namely, whether the vendor of a materialman, furnishing materials to a materialman who performed no work or labor, in connection with a Government project, is entitled to sue upon the payment bond of the public contractor under the Miller Act, has not only never been passed upon by this Court but has never been previously determined by any Federal Court.

> "Apparently, the question is one of first impression since our independent research and that of both counsel have failed to unearth any similar situations passed upon by either the Supreme Court or any Circuit Court of Appeals." Cf. Opinion, Circuit Court of Appeals (R. 23).

The much broader question involved in the holding of the Circuit Court of Appeals, namely, the unlimited right of the most remote claimants to sue upon the bond, is similarly without precedent in any of the Federal Courts insofar as the Miller Act is concerned.

The case of *Fleisher Engineering & Construction Co. v. United States*, 311 U. S. 15, while it involved the section of the Miller Act here in question, dealt only with the procedure in giving the required notice to the contractor. This Court, however, in that case expressly pointed out, at page 18 of its opinion, that a distinction should be drawn between the provision explicitly stating the condition precedent to the right to sue and the provisions as to the manner of serving notice; apparently implying a strict construction of so much of the proviso as described the persons entitled to sue and the relationships covered.

Moreover, this Court has not passed upon the questions here involved in any case decided under the predecessor statute, the Heard Act. Any such determination under the Heard Act in any case would not be controlling in view of the fact that the Heard Act did not contain the express language of limitation set forth in Section 2(a) of the Miller Act.

Plaintiff, and the Court below, place great stress upon the case of *Utah Construction Co. v. United States To Use of Lindstrom Const. Co.*, 15 F. 2d 21, decided under the Heard Act, and the denial of certiorari in that case by the Supreme Court (see Op. of C. C. A.—R. 27). That case does not constitute an adjudication by this Court of the question here involved, for the following reasons: First, it involved a different statute which contained no such clarifying provision as Section 2(a) of the Miller Act, which obviously was an effort on the part of the legislature to eliminate the ambiguity which existed in the

Heard Act, and which led to the necessity of the Supreme Court insisting upon a liberal construction of that Act to correct the very restricted construction which had been adopted by some of the lower courts. *Hill* v. *American Surety Co.*, 200 U. S. 197; *Illinois Surety Co.* v. *John Davis Co. et al.*, 244 U. S. 376; secondly, the evidence submitted and the findings of the lower court after trial of the issues in that case were sufficient for the Circuit Court of Appeals to hold that the persons whose claims were allowed were either subcontractors or persons who dealt with subcontractors, the Court saying at page 24 of its opinion:

> "The fact that the contract with Paul provided for compensation computed upon the quantity of material transported does not necessarily affect the question; nor, indeed, would it exclude his relationship as that of a subcontractor. * * * *But as he did supply material and labor* which were used, whether he be called a materialman or a subcontractor supplying labor is not of vital importance, for the statute is broad enough to afford protection to him and relator." (Italics supplied.)

Thirdly, this Court never reviewed the *Utah Construction Company* case, *supra*, but merely denied certiorari, which denial does not in any way import an expression of opinion upon the merits of the case.

United States v. *Carver*, 260 U. S. 482, 490.

B. The legislative history of the Miller Act indicates the importance of the question involved and necessity for final determination by this Court.

The Miller Act was enacted in 1935, to replace the Heard Act, which required a single bond to be given by

the contractor, the United States having the right, within a certain time, to bring suit and have claims of various claimants adjudicated. If no such suits were brought, the claimants could institute suit only after six months following completion and final settlement. Under the Miller Act the contractor is required to furnish two bonds, namely, a performance bond for the protection of the United States and a payment bond for the protection of persons furnishing labor and materials. It has been indicated that the Miller Act was intended solely to correct procedural defects in the Heard Act and gave no new substantive rights to laborers and materialmen.

> *United States to Use of Kewaunee Mfg. Co.* v. *United States Guarantee Co.*, 37 F. Supp. 561 (Dist. Ct., W. D. N. Y., 1939);
>
> *Irwin et al.* v. *United States to Use of Noland Co. Inc.*, 122 F. (2) 73, at 76 (U. S. Ct. of App. Dist. of Col., 1941), reversed on other grounds 316 U. S. 23.

The Heard Act was repealed at the time of the enactment of the Miller Act. The Miller Act originated in the House of Representatives as HR-8519, and was referred to the House Judiciary Committee. The report of the Committee (Report No. 1263) was adopted and acted upon by the House without opposition. Reference to the Congressional Record indicates that no opposition to the bill arose in the Committee, and that the report of the Committee was unanimous (Cong. Rec. Vol. 79, Part 11, p. 11702).

In the Senate the bill was referred to the Senate Judiciary Committee and was favorably reported by that Committee (Report No. 1238). The Senate also acted on the report of its Committee without any opposition.

The Senate Judiciary Committee adopted, in full, as its report, that of the House Judiciary Committee (Cong. Rec. Vol. 79, Part 12, p. 13382). Accordingly, both reports contain the following language which seems conclusive on the issue presented in this case:

> "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond."

The Congress, through its Committees, obviously was expressing a limitation upon the classes of persons protected, and even though such expression might be imperfectly phrased it is important that the courts ascertain and give effect to such legislative intent.

> *103 Park Ave. Co.* v. *Exchange Buffet Corp.*, 242 N. Y. 366, 374 (Cardozo, *J.*).

The proviso contained in Section 2(a) of the Act is, of course, the only language of limitation in the bill to which the Committee Report could have reference. This Report was adopted after extensive hearings held by the House Committee (Hearing before Committee on the Judiciary, House of Rep. 74th Congress, 1st Sess., U. S. Govt. Printing Office, Doc. #143338) on a number of similar bills at which testimony was given by representatives of contractors, materialmen, surety companies and the Government. The importance which the Committee attached to the proviso is indicated by the fact that an almost identical bill had been introduced by Representative Miller, Chairman of the Sub-Committee (HR-6677). This bill was withdrawn and the final bill which bears the name of its author (HR-8519) was adopted. Section 2(a) of each of these bills is reproduced as Exhibits I and II.

to Petitioners' Petition for Rehearing (R. 41, 42). The language of the proviso in the former bill, which was not enacted (R. 42), would have entitled the plaintiff to sue upon the payment bond. This bill, however, was rejected and HR-8519, which contains clear language of limitation and which is referred to as a limitation in the Committee Report, was enacted.

The decision of the Circuit Court of Appeals completely disregards or lightly disposes of all these considerations, namely: the fact that the Miller Act, which replaced the Heard Act, contained express provisions for the determination of the classes of persons entitled to sue; the Committee Report, after extensive hearings on the bill, plainly indicated that it intended such limitation; and it rejected a similar bill which would have permitted suit upon the bond by persons such as the plaintiff.

It is well established by decisions of this Court that the meaning of doubtful or ambiguous statutes may be shown by reference to Committee reports or statements of the member having the bill in charge, and that contrary statements made in debate in Congress are of very little weight to contradict expressions of intent found in the Committee reports.

United States v. *Wrightwood Dairy Co.*, 315 U. S. 110, 124;

Lapina v. *Williams*, 232 U. S. 78, 79;

Duplex Printing Press Co. v. *Deering, et al.*, 254 U. S. 443, 475;

McLean v. *United States*, 226 U. S. 374, 380;

Northern Pacific Railway Co. v. *State of Washington*, 222 U. S. 370, 380;

Oceanic Steam Navigation Co. v. *Stranahan*, 214 U. S. 320, 333.

It is submitted that the legislative history, and particularly the Committee Reports, required the Circuit Court of Appeals to affirm the District Court, and that its failure to do so requires review by this Court.

C. The Circuit Court of Appeals decision creates confusion in the important field of building contract law as applied both in the Federal and State courts.

The Circuit Court of Appeals in its opinion (R. 22-29) has failed to give effect to the well recognized distinction in the building construction trade and in building contract law between a subcontractor and a materialman. This distinction is at the root of the mechanics' lien law statutes which may be said to be in *pari materia* with payment bonds under Government contracts, payment bonds being intended to protect persons who would otherwise be entitled to a mechanic's lien if the property in question were privately owned.

> *Irwin et al.* v. *U. S. to Use of Noland Co., Inc.*, 122 F. 2d 73 (reversed on other grounds 316 U. S. 23);
>
> *Neary, et al.* v. *Puget Sound Engineering Co. et al.*, 114 Wash. 1, 194 Pac. 830;
>
> *City of St. Louis* v. *Kaplan-McGowan Co.*, 233 Mo. App. 789, 108 S. W. 2d 987.

Despite the reference in the Circuit Court's opinion (R. 28-29) to the lack of accord between the cases distinguishing between a subcontractor and a materialman, it is certainly established by the overwhelming weight of authority in this country that

> "a subcontractor is one who furnishes work and materials, or work alone, under a contract, not with the owner, but with the contractor."

Boisot on Mechanics' Liens, Section 223, and that as a general rule one who merely furnishes the contractor with materials performing no work or labor is a materialman.

Boisot on Mechanics' Liens, Section 224;
Bloom on Mechanics' Liens, Sections 77, 78 and 79;
Staples v. *Adams, Payne & Gleaves, Inc.*, 215 Fed. 322;
Neary et al. v. *Puget Sound Engineering Co., et al.*, 114 Wash. 1, 194 Pac. 830;
9 Corpus Juris 694;
40 Corpus Juris 130.

Not only is the Circuit Court of Appeals decision at variance with the weight of authority in this country with respect to the general classification and definition of subcontractors and materialmen, but is in conflict with the weight of authority under similar public works statutes enacted by the various states.

"• • • it is generally held that a remote materialman, *i. e.*, one furnishing materials to a mere materialman rather than to a contractor or subcontractor, cannot recover on a public contractor's bond executed pursuant to a statute providing for a bond for the benefit of laborers and materialmen, although such materialman in turn sells the material to a contractor or subcontractor."

118 A. L. R. Anno. at p. 84;
Northwest Roads Co. v. *Clyde Equipment Co.*, 79 F. 2d 771 (C. C. A. 9th, 1935);
Neary v. *Puget Sound Engineering Co.*, 114 Wash. 1, 194 Pac. 830;
Garbutt v. *Chappe et al.*, 131 Cal. App. 284, 21 Pac. 2d 594;

Huddleston v. *Nislar*, 72 S. W. 2d 959 (Ct. of Apps. Texas, 1934);
City of St. Louis v. *Kaplan-McGowan Co.*, 233 Mo. App. 789, 108 S. W. 2d 987;
Marsh v. *Rothey*, 177 W. Va. 94, 183 S. E. 914.

Moreover the Circuit Court holding will have the effect of creating uncertainty in a great number of public contracts entered into by various departments of the United States Government including the War and Navy Departments. As is well known, in these contracts and in the execution of them by the various Government Departments, a distinction has always been made between subcontractors and materialmen, subcontractors being confined to those performing by agreement a portion of the work which the contractor contracted to perform and materialmen being those supplying goods or materials under purchase orders.

Under the "cost-plus-fixed-fee" type of contract a very clear distinction has been made. This distinction is particularly important in view of the decisions of the Comptroller General to the effect that the fixed fee under such contracts is intended to include all work to be performed under the prime contract and that the subletting of any portion of the work other than as expressly provided in the prime contract would result in the Government being improperly charged an additional fee to cover the subcontractor's profit. 20 Comp. Gen. 533 at 536, 537 (Decision B-15341); 21 Comp. Gen. 813 at 816, 817 (Decision B-23215). Obviously the holding of the Circuit Court of Appeals which brushes aside such well-recognized distinctions between subcontractors and materialmen will result in great confusion in the administration of the unprecedented number of Government contracts now in force.

It is submitted that, in view of the fact that the Circuit Court of Appeals decision is not in accord with the well-recognized distinction in the state courts governing relations between contractors, subcontractors and materialmen, which distinction has been followed in the administration of billions of dollars in Government contracts by the United States, and is not in accord with the majority state court decisions on public works statutes upon which the Miller Act was patterned, thus leading to confusion in this important branch of the law, the question here involved should be presently and finally determined by this Court.

POINT II.

The decision of the Circuit Court of Appeals, insofar as it purports to follow the decisions under the earlier Heard Act, is in conflict with a reported opinion of a Federal court of similar appellate jurisdiction.

The Heard Act, which preceded and was repealed by the Miller Act, contained no such specific proviso as is contained in the second section of the Miller Act. The Circuit Court of Appeals, holding that the portion of the Act in question was not a proviso, has purported to follow decisions of this Court under the Heard Act (R. 27-28).

Hill v. *American Surety Co.*, 200 U. S. 197;
Illinois Surety Co. v. *John Davis Co.*, 240 U. S. 376;
Standard Accident Ins. Co. v. *United States For Use of Powell*, 302 U. S. 442;
Fleischman Const. Co. v. *United States for the Use of Fornsberg*, 270 U. S. 349.

None of these cases, which purport to require a liberal construction of the Heard Act, extended the protection of the bond in the Heard Act to persons other than those having contractual relationship with the contractor or with a subcontractor and did not involve the question here presented. The policy of liberal construction adopted by the United States Supreme Court falls within the accepted theory of liberal construction of remedial statutes, which doctrine is limited, however, by the well established rule that remedial statutes are to be liberally construed only with respect to the rights of persons or classes who are established as being within the protection of the statute, and that, in determining the classes protected, the statute must be strictly construed.

> *Tipton Realty & Abstract Co.* v. *Kokomo Stone Co. et al.*, 61 Ind. App. 681, 110 N. E. 688;
> See also *Fleisher Engineering & Construction Co.* v. *United States*, 311 U. S. 15, discussed at page 12, *supra*.

Insofar as the Circuit Court of Appeals has purported to follow the decisions under the earlier Heard Act, it is in conflict with the decision of the Court of Appeals of the District of Columbia in the case of *Continental Casualty Co.* v. *North American Cement Corp.*, 91 F. 2d 307, which case involved a statute of said District identical with the Heard Act. In that case, the Court, speaking of the contention of the plaintiff, who was a vendor of a materialman who supplied cement to the principal contractor, and speaking also of the language contained in *Hill* v. *American Surety Co.*, *supra*, relied upon by that plaintiff, said at page 308:

> "This construction of the statute is about as broad as words can make it. Accepted at face, it implies a

right of protection to any person doing work or furnishing material in the carrying out of the contract however remote the relationship to the contractor. It would permit intervention by the manufacturer of materials furnished to the vendor of a subcontractor even though the subcontractor had paid the vendor in full. It would permit one who sells material to another materialman who in turn furnishes it to the contractor to recover against the bond. It would, in my opinion, establish a rule resulting in confusion; and, since the *Hill* case involves only the right of a furnisher of supplies or labor, immediately to the subcontractor, to look to the bond for protection, the broad implications of the language may be disregarded. For the present, at least, we are unwilling to construe the local statute as going to that extent. In saying this we are not unmindful that at least in one of the other Circuits such a rule was adopted. In the case of *Utah Construction Co.* v. *United States* (C. C. A.), 15 F. (2d) 21, the intervener was a corporation which had supplied materials to the vendor of materials to a subcontractor, and it was held that the statute was broad enough to afford it protection."

The *Continental Casualty Company* case, *supra*, was decided subsequent to the adoption of the Miller Act. While this, strictly speaking, does not constitute a conflict of decisions of different circuits, it does represent a substantial variance between one circuit and a federal court of analogous appellate jurisdiction which, by reason of the large number of public buildings erected within its jurisdiction, has had wide experience with suits relating to Government contracts.

POINT III.

The public interest and particularly the interest of the United States Government, will be promoted by prompt settlement in this Court of the questions involved.

The failure of the Court of Appeals to give any effect to the language of the second section of the Miller Act as a limitation, by way of proviso, opens the door to suits upon the payment bond by an indeterminable class of claimants. Obviously, if no contractual relationship with either the contractor or a subcontractor is required, any person whose work, services or goods have in any way contributed to or been incorporated in the public project may sue upon the bond. This possibility has been recognized by at least one Federal Court and by various state courts in the interpretation of state statutes. *Continental Casualty Co.* v. *North American Cement Corp.* (*supra*), *Garbutt* v. *Chappe, et al.*, 131 Cal. App. 284, 21 Pac. 2d 594. In *Bohnen* v. *Metz*, 126 App. Div. 807 (aff'd 193 N. Y. 676), involving the New York State Labor Law, the Court said at page 809:

> "The construction of the statute contended for by plaintiff would follow the iron beams necessary for a building to the mines, the woodwork to the logging camp and the stone to the quarry, and would put a contractor to the hazard of forfeiture of his contract and all payments due him in the purchase of any material for the construction of any municipal building."

Certainly from the viewpoint of the Government there is no advantage in extending protection beyond the two definite classes, which the statute clearly seems intended

to protect, namely, those who have contributed work or materials through dealings had with the prime contractor or had directly with a subcontractor on whose credit the prime contractor was willing to rely. What public interest would be served by extending such protection to jobbers, manufacturers, dealers, etc., is not to be found either in the statute or the legislative history leading to its enactment.

On the contrary, such a result not only makes the statute impracticable of enforcement, but will have a direct adverse effect upon the letting of public contracts. The writing of the bond by a surety company is no protection to the contractor, as the contractor is primarily liable upon the bond and is required to indemnify the surety company against any loss. The holding of the Circuit Court of Appeals places upon the Government contractors an unlimited and indeterminable risk, against which the contractor is powerless to protect himself. Such risk must, therefore, be reflected in any lump sum bid, or in the fee which the contractor is to receive under a cost plus fixed fee type of contract.

Obviously, Government contractors will not accept Government work at prevailing fees if there is no determinable limit to or means of protecting themselves against possible liability to the most remote claimants who may have contributed work or materials to some part of the completed project, even though such contribution may have been in the manufacture or mining of materials many miles from the site and passing through the hands of numerous persons, such as miners, manufacturers, distributors, supply men, jobbers, vendors and materialmen before final incorporation in the work.

The taking of a bond from subcontractors would be no protection as it would be impossible to determine the scope of the bond unless an endless chain of bonds at pro-

hibitive cost were to be obtained. Moreover, in the prevalent cost plus fixed fee type of contract the Government contractor is required to deal with persons furnishing the lowest bids approved by the Government, and therefore is rarely free to deal with a subcontractor or materialman solely on the basis of the contractor's own knowledge of his reliability and financial responsibility.

Also added to the cost of Government work and ultimately borne by the Government under the holding of the Circuit Court of Appeals will be the greatly increased cost of the premium for writing such bonds exposing the surety company to possible unlimited liability.

Moreover, if the Circuit Court of Appeals decision stands, Government contractors may well claim reimbursement from the Government for sums recovered by unpaid vendors and materialmen who had no direct dealings with the contractor or the subcontractor on the theory that such risk was not contemplated in the determination of the fixed fee, and, therefore, should be borne by the Government as an item of cost of performance.

The Comptroller General has recognized that the prevalent cost-plus-fixed-fee type of contract "contemplates that the actual cost of the whole work and the risk thereof are to be assumed by the Government; that is, that the contractor is to come out whole regardless of contingencies in performing the work in accordance with the contract and the directions and instructions of the contracting officer, plus only a limited fixed fee as compensation for services, general overhead, use of the contractor's own or borrowed money and profit", and that the comparatively small fixed fee is not intended to compensate the contractor for the risks and contingencies of work of such character and magnitude which ordinarily are assumed by the contractor and covered by the contract price. 20 Comp. Gen. 632 at 636, 637 (Decision B-15593). Such

theory is of course entirely contrary to the imposition upon contractors of the unusual risk which results from the holding of the Circuit Court of Appeals.

In view of the unprecedented number of Government contracts now outstanding and the probability that the question here presented will arise in many cases where the Government has insisted upon a payment bond and in view of the expected and probable large scale letting of contracts by the Government in the post-war period, it is essential, in the public interest, that a final determination of this question be made at the present time, thus eliminating the uncertainty and consequent bulk of litigation which prevailed under the Heard Act.

Respectfully submitted,

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APPENDIX A.

The Miller Act.

An Act Requiring Contracts for the Construction, Alteration, and Repair of Any Public Building or Public Work of the United States to Be Accompanied by a Performance Bond Protecting the United States and by an Additional Bond for the Protection of Persons Furnishing Material and Labor for the Construction, Alteration, or Repair of Said Public Building or Public Work.

49 Stat. at L. 793, Act Aug. 24, 1935, c. 642, §1, 40 USCA §270a. **Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country.**

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half

the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

49 Stat. at L. 794, Act Aug. 24, 1935, c. 642, §2, 40 USCA §270b. **Same; rights of persons furnishing labor or material.**

Sec. 2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at

the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

40 Stat. at L. 794, Act. Aug. 24, 1935, c. 642, §3, 40 USCA §270c. **Same; right of person furnishing labor or material to copy of bond.**

Sec. 3. The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be *prima facie* evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof.

49 Stat. at L. 794, Act Aug. 24, 1935, c. 642, §4, 40 USCA §270d: **Same; definition of "person" in sections 270a, 270b and 270c.**

Sec. 4. The term "person" and the masculine pronoun as used in sections 270a, 270b and 270c of this title shall include all persons whether individuals, associations, copartnerships, or corporations.

Sec. 5. This act shall take effect upon the expiration of sixty days after the date of its enactment, but shall not apply to any contract awarded pursuant to any invitation for bids issued on or before the date it takes effect, or to any persons or bonds in respect of any such contract. The act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894, as amended (U. S. C. title 40, sec. 270), is repealed, except that such Act shall remain in force with respect to contracts for which invitations for bids have been issued on or before the date this Act takes effect, and to persons or bonds in respect of such contracts.

APPENDIX B.

The Heard Act.

(Repealed by the Miller Act, §5.)

40 USCA §270 (Aug. 13, 1894, c. 280, 28 Stat. at L. 278; Feb. 24, 1905, c. 778, 33 Stat. at L. 811; Mar. 3, 1911, c. 231, §291, 36 Stat. at L. 1167). **Bonds of contractors for public buildings or works; right of persons furnishing labor and material.**

Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed *pro rata* among said in-

interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the District Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided*, That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided further*, That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor *pro rata* of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any

amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: *Provided further*, That in all suits instituted under the provisions of this section such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.